A

Dato Sri Celestine Ujang anak Jilan v Sunrise Cultivations Sdn Bhd & Anor

B HIGH COURT (KUCHING) — SUIT NO 22–79 OF 2005-I
CLEMENT SKINNER J
10 AUGUST 2007

C *Contract — Privity — Sale and purchase agreement — Sale and purchase of shares — Allegation of separate oral agreement with managing director of first defendant, to repay personal loan given to plaintiff — Whether set-off by first defendant allowed*

D *Contract — Sale and purchase of shares — Failure to pay balance price — Allegation of separate oral agreement with managing director of first defendant, to repay personal loan given to plaintiff — Whether set-off by first defendant allowed*

E

The plaintiff owned some 37,500 ordinary shares in Sebekai Plantations Sdn Bhd ('company'). There were also four other shareholders in the company who between them owned some 52,500 ordinary shares. By a share sale F agreement ('sale agreement') the plaintiff and the other four shareholders agreed to sell to the first defendant all the 90,000 shares in the company, on the terms and conditions stated in the sale agreement. The agreed purchase price for the said 90,000 ordinary shares was RM5,928,000. Since the plaintiff owned 37,000 of the shares sold, the portion of the purchase price G payable to him amounted to RM2,470,000. On the signing of the sale agreement the first defendant duly paid and the plaintiff duly received his portion of the 10% deposit cum part payment of the purchase price amounting to RM247,000, leaving a balance sum of RM2,223,000 payable to him which he claimed had fallen due and payable. The plaintiff claimed H that the vendors had duly complied with all the terms in the sale agreement. The first defendant alleged that there was a separate oral agreement between the plaintiff and one Mr Hii Eii Sing ('Mr Hii'), who was also the managing director of the first defendant, that a total of RM1.5m proceeds from the sale of the plaintiff's shares in the company would be used to repay a loan taken I by the plaintiff from Mr Hii leaving a sum of RM723,000 still payable to the plaintiff. The first defendant then paid the sum of RM723,000 to the second defendant as stakeholder. It was the plaintiff's case that he was never indebted to Mr Hii as alleged or that Mr Hii was privy to the sale agreement. The plaintiff maintained the first defendant was in breach of the sale

agreement and that he was entitled to be paid the balance sum of RM2,223,000. The plaintiff applied pursuant to O 14 Rules of the High Court 1980 for summary judgment and also to strike out the first defendant's defence, set-off and counterclaim.

Held, allowing the plaintiff's appeals with costs:

(1) Applying the test laid down in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400, the assertion made by the first defendant through Mr Hii that there was a separate oral agreement between the plaintiff and Mr Hii, that the proceeds from the sale of the plaintiff's shares in the company would be used to repay the loan taken by the plaintiff from Mr Hii through a set-off affected by the first defendant, was not only inherently improbable in itself, but was also inconsistent with undisputed contemporary documents written by Mr Hii himself. This assertion was not made bona fide and it did not give rise to any bona fide triable issue (see para 45).

(2) The sale of shares agreement was entered into between the plaintiff and the first defendant company. Mr Hii was not a party to it. Thus he was not privy to the sale agreement. Likewise, the first defendant was not privy to the alleged personal loan between Mr Hii and the plaintiff. Accordingly, only the first defendant could sue or be sued on the sale agreement. It is also well settled that a company and its shareholders are separate legal entities (see *Tai Choi Yiew v Syarikat Tingan Lumber Sdn Bhd* [1998] 4 MLJ 275) (see para 48).

(3) The first defendant's defence of set-off was clearly unsustainable in law as a set-off must be a cross claim between the same contracting parties and the set-off must be clearly connected with the plaintiff's claim. It is impossible in law to set-off an unrelated debt in the absence of a proper assignment or novation of which there was none in this instant case. The fact that Mr Hii had commenced another suit against the plaintiff for the repayment of the alleged loan clearly showed that there was no assignment or novation in this instant case (see *Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd* [1985] 1 MLJ 157) (see paras 50–53).

[Bahasa Malaysia summary

Plaintif memiliki 37,500 saham biasa di dalam Sebekai Plantations Sdn Bhd (syarikat tersebut). Terdapat juga empat pemegang saham yang lain di syarikat tersebut yang di antara mereka memiliki 52,500 saham biasa. Melalui satu perjanjian jualan saham (perjanjian jualan) plaintif dan keempat-empat pemegang saham bersetuju menjual kepada defendan pertama kesemua 90,000 saham di dalam syarikat tersebut, mengikut

terma-terma dan syarat-syarat yang dinyatakan di dalam perjanjian jualan tersebut. Harga belian yang dipersetujui untuk 90,000 saham biasa ialah RM5,928,000. Oleh kerana plaintif memiliki 37,000 saham yang dijualkan tersebut, bahagian harga belian yang perlu dibayar kepadanya berjumlah RM2,470,000. Pada tarikh tandatangan perjanjian jualan tersebut defendan pertama telah membayar 10% deposit yang merupakan sebahagian bayaran harga belian dan plaintif telah menerima bahagiannya berjumlah RM247,000, meninggalkan baki berjumlah RM2,223,000 yang perlu dibayar kepadanya yang plaintif mendakwa telah sampai masa untuk dibayar dan harus dibayar. Plaintif mendakwa bahawa penjual-penjual telah mematuhi kesemua terma-terma di dalam perjanjian jualan tersebut. Defendan pertama mengatakan bahawa terdapat satu perjanjian lisan yang berasingan di antara plaintif dan En Hii Eii Sing ('En Hii'), yang juga merupakan pengarah pengurus defendan pertama, bahawa jumlah RM1.5j hasil daripada jualan saham-saham plaintif di syarikat tersebut akan digunakan untuk membayar balik pinjaman yang diambil oleh plaintif daripada En Hii meninggalkan jumlah RM723,000 yang perlu dibayar kepada plaintif. Defendan pertama kemudiannya membayar RM723,000 kepada defendan kedua sebagai pemegang amanah. Ia adalah kes plaintif bahawa beliau tidak pernah terhutang kepada En Hii seperti yang didakwa ataupun En Hii adalah privi kepada perjanjian jualan. Plaintif menegaskan bahawa defendan pertama memungkiri perjanjian jualan tersebut dan ia adalah berhak dibayar baki jumlah RM2,223,000 tersebut. Plaintif memohon mengikut A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk penghakiman terus dan juga untuk membatalkan pembelaan, tolakan dan tuntutan balas defendan pertama.

Diputuskan, membenarkan rayuan-rayuan plaintif dengan kos:

(1) Mengguna pakai ujian yang ditetapkan di dalam kes *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400, pernyataan yang dibuat oleh defendan pertama melalui En Hii bahawa terdapat satu perjanjian lisan yang berasingan di antara plaintif dan En Hii bahawa hasil daripada jualan saham-saham plaintif di syarikat tersebut akan digunakan untuk membayar balik pinjaman yang diambil oleh plaintif daripada En Hii melalui tolakan yang dibuat oleh defendan pertama, bukan sahaja tidak berkemungkinan sesungguhnya, tetapi juga tidak konsisten dengan dokumen kontemporari yang ditulis oleh En Hii sendiri. Pernyataan ini adalah tidak bona fide dan tidak membangkitkan sebarang isu bona fide yang harus dibicarakan (lihat perenggan 45).

(2) Perjanjian jualan saham dimasuki di antara plaintif dan syarikat defendan pertama. En Hii bukanlah pihak kepadanya. Dia oleh itu

bukan privi kepada perjanjian jualan tersebut. Begitu juga, defendan pertama bukan privi kepada pinjaman peribadi yang didakwa di antara En Hii dan plaintif. Dengan itu, hanya defendan pertama boleh menyaman atau disaman atas perjanjian jualan tersebut. Ia juga adalah ditetapkan bahawa sesebuah syarikat dan pemegang-pemegang sahamnya adalah entiti yang berasingan (lihat *Tai Choi Yiew v Syarikat Tingan Lumber Sdn Bhd* [1998] 4 MLJ 275) (lihat perenggan 48).

(3) Pembelaan tolakan defendan pertama adalah nyata tidak boleh dibenarkan di sisi undang-undang oleh kerana sesuatu tolakan mestilah menjadi tuntutan balas di antara pihak-pihak yang sama yang memasuki perjanjian dan tolakan tersebut mesti nyata berhubung dengan tuntutan plaintif. Adalah mustahil di sisi undang-undang untuk menolak hutang yang tidak bersangkutan di dalam ketiadaan penyerahan yang betul atau novasi yang mana tidak terdapat di dalam kes ini. Fakta bahawa En Hii telah memulakan guaman lain terhadap plaintif untuk bayaran balik pinjaman yang didakwa jelas menunjukkan bahawa tidak terdapat penyerahanatau novasi di dalam kes ini (lihat *Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd* [1985] 1 MLJ 157) (lihat perenggan 50–53).]

Notes

For cases on failure to pay balance price, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 5015–5016.

For cases on sale and purchase agreement, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4638–4639.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400 (folld)

Harta Tuas Sdn Bhd v UB Usahabina Sdn Bhd [2006] MLJU 169 (refd)

Krishnamurthy & Anor v Malayan Finance Corporation Bhd [1986] 2 MLJ 134 (refd)

Perkapalan Shamelin Jaya Sdn Bhd & Anor v Alpine Bulk Transport New York [1997] 3 MLJ 818 (refd)

Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd [1985] 1 MLJ 157 (folld)

Tai Choi Yiew v Syarikat Tingan Lumber Sdn Bhd [1998] 4 MLJ 275 (refd)

Legislation referred to

Rules of the High Court 1980 O 14, O 18 r 19

Albert Tang (Chew Jugah, Wan Ullok & Co) for the plaintiff.
Augustine Liom (Tang & Partners Advocates) for the first defendant.

Clement Skinner J:

[1] This is the hearing of two appeals to the judge in chambers. They are brought by the plaintiff against the decision of the learned deputy registrar who, on 26 February 2007 dismissed two applications made by the plaintiff against the first defendant in this action. The plaintiff's first application was to enter summary judgment against the defendant under O 14 Rules of the High Court 1980 ('RHC'). The plaintiff's second application was to strike out the first defendant's defence, set-off and counterclaim filed in this action.

[2] The brief facts leading up to these appeals are these. The plaintiff here Dato Sri Celestine Ujang Anak Jilan ('plaintiff') owned some 37,500 ordinary shares in a company called Sebekai Plantations Sdn Bhd ('company'). There were also four other shareholders in the company who between them owned some 52,500 ordinary shares, so altogether there were 90,000 ordinary paid up shares issued in the company.

[3] By a share sale agreement in writing made on 3 February 2004 ('sale agreement') entered into between the plaintiff and the other four shareholders of the one part and the first defendant, a company called Sunrise Calvitations Sdn Bhd ('first defendant') of the other part, the plaintiff and the four shareholders, as vendors, agreed to sell and the first defendant as purchaser, agreed to purchase the 90,000 ordinary paid up shares owned by the plaintiff and the four other shareholders in the company, on the terms and conditions stated in the sale agreement.

[4] The agreed purchase price for the said 90,000 ordinary shares was RM5,928,000. Since the plaintiff owned 37,000 of the shares sold, the portion of the purchase price payable to him amounted to RM2,470,000.

[5] On the signing of the sale agreement the first defendant duly paid and the plaintiff duly received his portion of the 10% deposit cum part payment of the purchase price amounting to RM247,000, leaving a balance sum of RM2,223,000 payable to him which he claims has fallen due and payable.

[6] For the purpose of these appeals, it will be necessary to refer only to a few of the clauses contained in the sale agreement. Clause 8.2(b) of the sale agreement states:

> Subject to the fulfillment of the Condition Precedent under clause 3 herein above, the balance of the purchase price in the sum of Ringgit Malaysia Five Million Three Hundred Thirty Five Thousand and Two Hundred only (RM5,335,200.00)

shall be paid by the purchase within ninety (90) days from the date hereafter or extended date and upon the transfer of the sale shares to the Purchaser (hereafter referred to as 'the settlement date').

[7] According to the plaintiff the condition precedent mentioned in cl 3 have been fulfilled and are no longer of relevance to the matter before the court.

[8] Clause 9 of the sale agreement states:

The Vendors shall, upon receipt of payment of the deposit cum part payment of the purchase price and upon the execution of this agreement, execute the FORM OF TRANSFER OF SECURITIES (FORM 32A) in respect of the sale shares in favour of the Purchaser and/or its nominee(s) and shall place the same together with the respective Shares Certificate with Messrs Huang & Company Advocates to be arranged for registration.

[9] Clause 10 of the sale agreement states:

10.1 concurrently with the signing of this Agreement, the Vendors shall procure and deliver to the purchaser the following:

(a) the original Share Certificate in respect of the sale shares;

(b) valid and registrable FORM OF TRANSFER OF SECURITIES (FORM 32A) in respect of the Sale Shares duly executed by the Vendors in favour of the Purchaser and/or its nominee(s);

(c) the Directors' resolution of the Company approving the transfer of the sale shares in favour of the Purchaser together with the necessary documents for the appointment of additional director (s) to be nominated by the Purchaser;

(d) the dated Registration Letters of all the directors of the Company without compensation, damages, claims or any other payment whatsoever from the company;

(e) the dated Registration Letter to the Company Secretary of the Company waiving all rights to compensation, damages, claims or any payment whatsoever from the Company;

(f) the dated Registration Letter of the auditors of the Company waiving rights of the compensation, damages, claims or any payment whatsoever from the Company;

(g) all statutory and account books, invoices, the common seal, share seal, rubber stamp, estate licences (if any) and all other documents

A and titles relating to the assets and properties of the company including:

(i) All available copies of the Memorandum and Articles of Association of the company;

B

(ii) Minute Book of the company;

(iii) Statutory Register of Members and the Share Certificate Book;

(iv) Secretarial files containing copies of all retruns lodged with the Registrar of Companies;

C

(v) Certified true copies of the Audited Accounts of the Company;

(vi) Correspondence of the Company; and

D

(vii)All other document affecting the Company;

(h) to revoke all authorities and surrender and pass over all the bank accounts to the purchaser and to change all the signatories of cheques with the Banks;

E

(i) all documents pertaining to the alienation of the Lands including Form L & S 80 and the EIA Report giving sanction for the development of the Lands into an oil palm estate.

F

[10] Clause 17 of the sale agreement states:

Time whenever mentioned herein shall be of the essence of this Agreement.

G

[11] Clause 19 of the sale agreement states:

In the event that the provisions under clause 3.1 shall have been complied with on or before the unconditional date but the purchaser shall refuse or be able to complete the purchase of the said Sale Shares or tender payment of the purchase price or any part thereof within the time and in the manner as stipulated in this Agreement without the Vendors defaulting in their warranties and representations or any terms and conditions herein contained, then all monies paid by the purchaser to the Vendors hereunder shall be treated as forfeited to the Vendors as agreed pre-estimated liquidated damages and upon such forfeiture this Agreement shall be deemed to have been rescinded by mutual consent of the parties here to whereupon all documents delivered to the Purchaser and/or the mutual solicitors shall be re-delivered to the Vendors without prejudice to the Vendor's right to apply for specific performance of this agreement.

H

I

[12] It is the plaintiff's case that he and the four other shareholders vendors, in performance of the sale agreement have:

(a) duly executed the transfer form, Form 32A in respect of all their shares in the company, and have delivered the same together with the share certificates to Messrs Huang & Co Advocates, Sibu, as required under cl 9 of the sale agreement;

(b) duly complied with cl 10 as well as the other requirements under the sale agreement.

[13] Hence, the plaintiff claims to be entitled to be paid the balance of the purchase price in respect of his shares sold to the first defendant, amounting to RM2,223,000.

[14] The first defendant did not pay the balance due and payable for the plaintiff's shares for the following reasons.

[15] A certain Mr Hii, who claims to be the 'de facto owner' and director of the first defendant company and the person who '*had always made decisions for the first defendant and represented the first defendant in business negotiations and deals*', alleges that around May or June of 1997, the plaintiff had obtained a personal loan of RM2,355,500 from him which he claims the plaintiff had promised to repay after withdrawing his (the plaintiff's) fixed deposits in a Singapore Bank.

[16] Mr Hii says that by late 1997, it become clear to him that the plaintiff was not going to repay the loan. Mr Hii said the plaintiff instead suggested Mr Hii apply for land from the government which the plaintiff would support, which Mr Hii said he did apply for but the application was not successful.

[17] Eventually, according to Mr Hii the plaintiff promised that he would repay the loan to Mr Hii on the sale of his (the plaintiff's) shares in the company to the first defendant. According to Mr Hii an agreement was reached between him and the plaintiff on the matter. This is how Mr Hii described the agreement in paras 20 to 23 of his affidavit affirmed on 21 January 2006 to oppose the plaintiff's O 14 application:

> 20. It was the understanding arrangement and agreement between the plaintiff and I as the owner and the owner and the person who decided for the first defendant company that the repayment of his said debt would be effected by a set-off or by contra from the value of his shares sold to the first defendant.
>
> 21. Such separate oral agreement as stated in para 20 above related only to the plaintiff's share and not to those of the other vendors constituted as between the plaintiff and the first defendant a condition precedent to the execution of the said

share sale agreement dated 3 February 2004 (marked as C2 and attached to the affidavit in support affirmed by the plaintiff on 20 December 2005) by the first defendant as it relates to the mode of payment by the first defendant of the plaintiff's share.

22. Sometime after the execution of the said share sale agreement (marked as C2), I approached the plaintiff at his office and he told me he was unable and unwilling to pay his said debt as his shareholding and interest in Sebekai Plantation Sdn Bhd had been reduced to about 25% on the directive of the Chief Minister from the original 75% and he would oppose any set-off from the proceeds of the sale of his shares to the first defendant.

23. The plaintiff's said change of stance from his earlier oral agreement for a set-off or contra necessitated me to write formally to the plaintiff on 27 July 2004 requesting that out of friendship and goodwill; only RM1.5m out of the proceeds of the plaintiff's share be set-off and applied towards settlement of his debt. A copy of my said letter of 27 July 2004 is now produced to me and exhibited and marked IFES-7.

[18] On 12 August 2004 the first defendant wrote a letter to Messrs Huang & Co, which letter was copied to the plaintiff, in which the first defendant purported to instruct Messrs Huang & Co and also to notify the plaintiff; that in response to a letter written by Mr Hii dated 10 August 2004 addressed to the plaintiff, an amount of RM1.5m would be set-off against whatever amount due to the plaintiff under the sale agreement.

[19] It should be noted that if RM1.5m is set-off against the balance sum of RM2,223,000 payable to the plaintiff for the sale of his shares, it will leave a sum of RM723,000 still payable to the plaintiff.

[20] The first defendant then paid the sum of RM723,000 to Messrs Huang & Co. On 18 December 2004, Messrs Huang & Co wrote to the plaintiff's lawyers informing the latter that a sum of RM723,000 had been placed with Messrs Huang & Co as stakeholder.

[21] It is the plaintiff's case that he was never indebted to Mr Hii as alleged or that Mr Hii is privy to the sale agreement. The plaintiff maintains the first defendant is in breach of the sale agreement and that he is entitled to be paid the balance sum of RM2,223,000. Hence the filing of this suit.

[22] The first defendant filed a defence, set-off and counterclaim. In its defence the first defendant repeated what I have stated above.

[23] The first defendant further pleaded in the alternative that the plaintiff's repeated assurances and promises made to Mr Hii in his personal capacity and as the managing director of the first defendant that the plaintiff

would repay the loan taken from Mr Hii from the proceeds of sale of his shares in the company, which Mr Hii and the first defendant relied on and acted on, constituted a fraud and cheating on the first defendant and Mr Hii. The first defendant also asserted that the plaintiff should be estopped from denying that he had agreed to repay his loan to Mr Hii in the manner described above. The first defendant also pleaded mistake based on the same facts.

[24] By way of set-off and counterclaim the first defendant claims to be entitled to set-off what was owing by the plaintiff to Mr Hii from the sum of RM2,355,500 payable to the plaintiff under the sale agreement. In the alternative, the first defendant seeks to have it declared that the sale agreement, in so far as it relates to the plaintiff, has been repudiated and for the refund by the plaintiff of the 10% deposit of RM247,000 paid to him, and, for the sum of RM723,000 held by Messrs Huang & Co as stakeholder be refunded to the first defendant.

[25] Hence the plaintiff's filing of his application for summary judgment under O 14, and his second application Under O 18 r 19 to strike out the defence, set-off and counterclaim of the first defendant.

[26] At this stage I need to mention two other related matters. The first in that after this suit was filed against the first defendant on 21 June 2005, Mr Hii filed a suit against the plaintiff vide Kuching High Court Suit No 22–112 of 2005 on 29 August 2005 (hereafter Suit 22–112 of 2005). In that suit Mr Hii is claiming the repayment of the loan of RM2,355,500 which he allegedly lent to the plaintiff in May or June 1997. The plaintiff is defending Suit 22–112 of 2005 where he denies he is indebted to Mr Hii as alleged. The plaintiff also tried to have Suit 22–112 of 2005 struck out against him on the grounds that Mr Hii Eii Sing's claim in that suit is time barred by limitation but the plaintiff's application was disallowed by the court. Accordingly Suit 22–112 of 2005 in which Mr Hii is claiming the repayment of the loan of RM2,355,800 from the plaintiff, is very much alive and is being vigorously pursued and resisted by Mr Hii and the plaintiff respectively.

[27] The second thing to note is that on application made to court by the plaintiff against Messrs Huang & Co in this suit, it was ordered that the sum of RM723,000 placed with Messrs Huang & Co as stakeholder, be paid into court. This has been done.

[28] Reverting to the appeals before the court, I will deal with the plaintiff's appeal on his O 14 application first.

[29] When this application first came up for hearing before the deputy registrar, the first defendant took the objection that there was delay on the part of the plaintiff in applying for summary judgment as this application was filed in only after the defence was filed. Relying on the case authority of *Krishnamurthy & Anor v Malayan Finance Corporation Bhd* [1986] 2 MLJ 134, counsel for the first defendant submitted that the plaintiff's application should fail on this ground alone. But the learned deputy registrar did not rule in favour of the first defendant on this ground. She instead disallowed the plaintiff's application as she found the defence had raised triable issues. The first defendant has now repeated before me its complaint that the plaintiff had delayed in filing his application for summary judgment.

[30] I find no merit in this complaint. In the first place this is an appeal against the decision of the learned deputy registrar. The first defendant never appealed against any part of that decision and so it is not open to the first defendant to take the point. In the second place, the delay was for a period of two months which the plaintiff explained was caused by his travelling and his lawyer being on leave. I find these explanations acceptable. Thirdly and more importantly, mere delay on its own will not defeat an application for summary judgment where there is no bona fide defence to the plaintiff's claim (see *Perkapalan Shamelin Jaya Sdn Bhd & Anor v Alpine Bulk Transport New York* [1997] 3 MLJ 818 and *Harta Tuas Sdn Bhd v UB Usahabina Sdn Bhd* [2006] MLJU 169).

[31] The principles on which the court acts when hearing an application under O 14 as are well settled. In *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 at p 408 Mohamed Azim SCJ said:

> Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in on affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with the undisputed contemporaneous documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application. Thus, apart them identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

[32] With that I turn to consider whether the first defendant has managed to raise any bona fide triable issues in this case.

[33] Learned counsel for the first defendant has tried to portray that this is not a suitable case for the summary jurisdiction of the court to be exercised because, according to him, lengthy affidavits have been filed and many complex issues of fact and law have been raised both in the pleadings and affidavits.

[34] In my judgment the mere fact that the first defendant, through Mr Hii has tried to raise as many issues as he can to try to show that this is a complex and highly disputed claim is not the true measure or test in deciding the plaintiff's O 14 application. The test is as stated by the Supreme Court in *Bank Negara Malaysia v Mohd Ismail & Anor*.

[35] It is clear to me from a reading of all the affidavits and the pleadings filed in this suit that the first defendant's defence, set-off and counterclaim all revolve around one crucial issue raised by the first defendant. It is this: The first defendant asserts that it is not obliged to pay the plaintiff the balance sum of RM2,223,000 because the plaintiff had agreed with Mr Hii that that sum would be used to repay to Mr Hii the loan of RM2,355,500 which the plaintiff had borrowed from Mr Hii. Therefore according to the first defendant, on the instructions of Mr Hii it is entitled to set-off or contra the sum of RM2,223,000 due to the plaintiff with what is repayable by the plaintiff to Mr Hii.

[36] The critical question I must ask myself is this: Does the assertion of the first defendant, give raise to any bona fide triable issue which should be investigated at a trial? The question is best answered after subjecting what the first defendant asserts to closer curial scrutiny.

[37] It should be noted that all the affidavits that were filed by the first defendant to oppose the plaintiff's O 14 application were affirmed by Mr Hii. Now, since (i) Mr Hii claims to be the 'de facto owner' of the first defendant and (ii) since it was Mr Hii who was the person who entered into the alleged oral understanding arrangement and agreement with the plaintiff that the plaintiff would repay his alleged debt to Mr Hii by way of a set-off or by contra from the proceeds of the sale of his shares sold to the first defendant company, and (iii) since Mr Hii claims that the oral agreement reached between him and the plaintiff formed a separate oral agreement which constituted a condition precedent to the execution of the sale agreement on 3 February 2004, the question arises: If what Mr Hii says is true, is it plausible and probable that the first defendant company, of which he is the 'de facto owner', would do the following things:

(a) Sign the sale agreement in which cl 22 clearly states:

> The parties hereby agree that this Agreement shall supersede all prior previous and antecedent negotiations or understandings and arrangements whatsoever between them;

(b) Pay to the plaintiff RM247,000 representing 10% deposit for the plaintiff's shares?;

(c) Only contra RM1.5m (instead of the entire amount owed) and pay the balance of RM724,000 to Messrs Huang & Co to hold as stakeholder?;

(d) Sign the sale agreement in which no reference whatsoever is made about the alleged agreement reached between the plaintiff and Mr Hii regarding the set-off or contra arrangement constituting a condition precedent to the execution of the sale agreement particularly so when there is a condition precedent clause in the sale agreement?

[38] Given the facts I have just pointed out, I find the first defendant's assertion about the alleged separate oral agreement which is made through Mr Hii, so inherently improbable that it defies belief.

[39] Quite apart from the fact that the assertion about there being a separate oral agreement being inherently improbable, such an assertion is also inconsistent with undisputed contemporary documents written by Mr Hii himself.

[40] On 27 July 2004 Mr Hii write a letter to the plaintiff. This was just five months after the sale agreement was signed. This letter reads;

> Dear Dato,
>
> With reference to our discussion or your office, I have requested my brother in-law Mr Lau of Sunrise Cultivations Sdn Bhd to pay me Ringgit Malaysia one million five hundred thousand only from the proceeds of the sale of your share in Sebekai Plantation Sdn Bhd as repayment of your indebtedness.
>
> Considering that you borrowed more than Ringgit Malaysia Two Million from me reversal years ago, which you already acknowledged previously, *I hope the above arrangement is agreeable to you*.

[41] Now, if there was already a separate oral agreement reached between Mr Hii and the plaintiff before the execution of the sale agreement as alleged, why would Mr Hii still ask the plaintiff in the second paragraph of that letter, 'I hope the above arrangement is agreeable to you,' Surely such an enquiry

and request for confirmation firmly indicates that there could never have been any such separate oral agreement as alleged.

[42] That there was never any such separate oral agreement reached between Mr Hii and the plaintiff about the proceeds of sale of the plaintiff's share in the company being used to set-off or contra with the amount owed to Mr Hii, is confirmed by the next letter which Mr Hii wrote to the plaintiff dated 10 August 2004. This letter reads:

> Dear Dato Sri,
>
> Re: Loan Of RM2,355,500.00
>
> I refer to my letter of 27th July 2004.
>
> 2. I have scrutinized the documents in my possession and custody and have now ascertained the exact amount of loan you have taken from me and sourced from various companies under my control to be RM2,355,500.00.
>
> 3. Out of goodwill, friendship and utmost good faith, I *have proposed* in my said letter an amicable mode of full settlement at a reduced figure of RM1.5 million *through a set-off* by Sunrise Cultivations Sdn. Bhd. (the purchaser) of which I am a director of the proceeds of sale of your own shares in Sebekai Plantation Sdn. Bhd. to the said company as per Share Sale Agreement dated 3rd February 2004.
>
> 4. This is without prejudice to my right to claim for the full sum of RM2,355,500.00 by legal action.
>
> 5. As you have not responded to me directly *regarding my said proposal* as the mode of settlement, I have no alternative but to request Sunrise Cultivation Sdn Bhd to proceed to put into effect *my said proposal*.
>
> 6. Messrs. Huang and Company Advocates shall be notified and restructed accordingly be separate letter.

[43] Now, this letter written by Mr Eii Hii Sing flatly contradicts everything he has said in his affidavit about there being a separate oral agreement which constitutes a condition precedent to the execution of the sale agreement because this letter was written some six months after the sale agreement was signed, and, in paras 3 and 5, Mr Hii clearly states and acknowledges that what he had stated in his earlier letter of 27 July 2004 was only a proposal.

[44] Even more significantly, para 3 of this letter shows that Mr Hii Eii Sing was only proposing for the first time a set-off from the proceeds of sale of the plaintiff's shares in his letter of 27 July 2004.

[45] Therefore, applying the test laid down by the Supreme Court in the *Bank Negara* case, I find the assertion made by the first defendant through

Mr Hii that there was a separate oral agreement between the plaintiff and Mr Hii that the proceeds from the sale of the plaintiff's shares in the company would be used to repay the loan taken by the plaintiff from Mr Hii through a set-off or contra effected by the first defendant, not only inherently improbable in itself, but it is also inconsistent with undisputed contemporary documents written by Mr Hii himself. I accordingly find this assertion is not made bona fide and it does not give rise to any bona fide triable issue.

[46] Since the first defendant's other defences like estoppel, fraud, cheating and mistake are all founded upon the allegation than there was a separate oral agreement between the plaintiff and Mr Hii which constituted a condition precedent to the execution of the said sale agreement which allegation I have rejected as incapable of giving rise to any triable issue, it must follow that these other defences of the first defendant are also unsustainable.

[47] Apart from the above, there are other reasons why the first defendant's assertion about there being an agreement between the plaintiff and Mr Hii on the set-off and contra arrangement cannot give rise to any triable issue.

[48] First, the issue of privity of contract which is raised by Mr Albert Tang of counsel for the plaintiff, Mr Tang contends, correctly in my view, that the sale of shares agreement was entered into between the plaintiff and the first defendant company. Mr Hii is not a party to it. He is not privy to the sale agreement. Like wise, the first defendant is not privy to the alleged personal loan between Hii Eii Sing and the plaintiff. Accordingly, only the first defendant can sue or be sued on the sale agreement. It is also well settled that a company and its shareholders are separate legal entities. In *Tai Choi Yiew v Syarikat Tingan Lumber Sdn Bhd* [1998] 4 MLJ 275 at p 278 Shaik Daud JCA speaking for the Court of Appeal said:

> The law is clear that a mere shareholder, a fortiori, a minority shareholder has no interest, legal or equitable in the property of a company (see *Macaura v Northern Assurance Co Ltd & Ors* [1925] AC 619 at p 626).

[49] Reverting to the facts of this case, it is clear to me that Mr Hii claims that he gave a personal loan to the plaintiff. Mr Hii also claims now that there is an alleged agreement between him and the plaintiff that the plaintiff will repay the loan through the proceeds of sale of his (the plaintiff's) shares in the company to the first defendant. Even if what Mr Hii says is true (which the plaintiff vigorously disputes), it is only Mr Hii who can sue on that alleged agreement. There is simply no legal basis on which the first defendant can do what it is trying to do in this case ie, refusing to pay the plaintiff the monies due to him on the sale of his shares in the company to the first defendant simply because he allegedly owes some money to Mr Hii who is a shareholder

of the first defendant company. The doctrine of privity of contract militates against the first defendant doing so.

[50] Secondly the first defendant's defence of set-off is clearly unsustainable in law for the following reasons: In *Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd* [1985] 1 MLJ 157 the Federal Court per Salleh Abas LP said at p 160:

> A set-off is a cross claim for a sum of money by a defendant against a plaintiffs claim for another sum of money for which the defendant is being sued.

[51] And at p 161 His Lordship further said:

> Being a defence to a plaintiff's action, the matter sought to be set-off must essentially be connected with or form part of the matter upon which the plaintiff's action is founded …
>
> With this principle in mind in that a set-off is a defence and that of a counterclaim consisting of matters to be set-off is added to the defence, such counterclaim becomes a special kind if counterclaim, and that the *set off must be clearly connected with the claim*, let us now examine the three items, which the respondents plead as set-off.

[52] So it will be seen from what the Federal Court stated that a set-off must be a cross claim between the same contracting parties and the set-off must be clearly connected with the plaintiff's claim.

[53] Reverting now to the facts of our case, what do they reveal?

[54] Here the amount sought to be set-off is an amount which is alleged owed by the plaintiff to Hii Eii Sing who is not a party to the sale agreement at all. I agree with counsel for the plaintiff that it is impossible in law to set-off an unrelated debt in the absence of a proper assignment or novation of which there is none in this case. In fact the fact that Hii Eii Sing has commenced Suit 22–112 of 2005 against the plaintiff for the repayment of the alleged loan clearly shows that there is no assignment or novation in this case.

[55] Having considered the other defence raised by the first defendant such as whether there has been a transfer of the plaintiff's share to the first defendant or whether the first defendant has been in breach of the sale agreement by depositing only RM723,000 with Messrs Huang & Co, instead of the full balance of the purchase price, I find them all non-issues. As far as the transfer of shares is concerned, the plaintiff has done all that was required

of him by signing the transfer form and surrendering the share certificates for his 90,000 shares to Messrs Huang & Co. The plaintiff having acted in compliance with the terms of the sale agreement there can be no issue at all on this ground. With regard to whether the first defendant was is in breach of the sale agreement by only depositing RM723,000 with Messrs Huang & Co, it must follow from what I have said earlier about the first defendant's assertion regarding the alleged set-off and separate oral agreement not raising any triable issue, that the first defendant is in breach. Clearly there is no triable issue on this ground too.

[56] From the submissions of learned counsel for the first defendant, it is clear to me that Mr Hii feels very aggrieved by the fact that the plaintiff should be able to sell his shares to a company owned by Mr Hii and be paid for the sale of those shares, but not repay to Mr Hii what the plaintiff has allegedly borrowed from Mr Hii.

[57] That might well be so, but this is not a court of morals. Mr Hii's grievience stems from the fact that he regards the first defendant company and himself as one and the same entity when in fact and in law that is not the case. Further, Mr Hii has instituted Suit 22–112 of 2005 in which he is claiming for the repayment of the loan allegedly given to the plaintiff. If he succeeds in that suit, he will be repaid the amounts allegedly borrowed by the plaintiff, but it would be unjust for the first defendant in this action not to pay the plaintiff. The first defendant and Mr Hii the plaintiff in Suit 22–112 of 2005 cannot have the proverbial cake and eat it at the same time, bearing in mind that the substance of the set-off is the same alleged personal debt in both the actions.

[58] For all the reason given above I find that the first defendant has not been able to raise a single bona fide triable issue to the plaintiff's claim. I accordingly allow the plaintiff's appeal against the decision of the learned deputy registrar on his O 14 application. I grant the plaintiff's application for summary judgment in the term prayed for. As regards to the plaintiff's appeal against the deputy registrar's refusal to strike out the first defendant's defence of set-off and counterclaim, it must follow from what I have said about the first defendant's defence not giving rise to a single triable issue, that the first defendants set-off and counterclaim being based on the same facts asserted by the first defence in its defence, it is clearly unsustainable and must be struck out. I accordingly allow the plaintiff's appeal against the decision of the deputy registrar on his application to struck out the first defendants defence, set-off and counterclaim.

[59] In the result I allow both appeals of the plaintiff with costs here and before the deputy registrar.

Appeals allowed with costs.

Reported by Sally Kee